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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 671

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA,

Petitioner,

vs.

STATE OF NEBRASKA, EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

WALTER R. JOHNSON,
Attorney General of Nebraska,
DON KELLEY,
Assistant Attorney General of Nebraska,
Counsel for Petitioner.

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A.

Statement of Matter Involved.

An original action in mandamus was filed in the Supreme Court of Nebraska by the State of Nebraska on the relation of Western Reference & Bond Association, Inc. (R. 1) (hereafter referred to as "the agency"), to compel V. B. Kinney, Secretary of Labor, petitioner herein, to issue to said agency a license to conduct a private employment agency.

In his amended answer (R. 4), the petitioner alleged that he had refused to issue the agency a license because of past violations and the threat of continued future violations of the private employment agency law with respect to the fees lawfully chargeable to applicants for employment.[1] The relevant part of said statute provides:

> "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact any other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer.' "

The agency in its petition claimed its refusal to comply with the foregoing was justified by the fact that said provision was void (R. 2-3), being in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 3, Article I, of the Constitution

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[1] Laws of Nebraska, 1921, Chapter 189, pages 701, 704 (Sec. 48-508, Compiled Statutes of Nebraska, 1929).

of the State of Nebraska, in that said provision deprived it of property without due process of law.

The matter was submitted to the Supreme Court of Nebraska on a motion for judgment on the pleadings (R. 4). In order that the issue would be limited, the parties stipulated (R. 7):

> "* * * that the sole and only issue for determination in the above entitled cause is the constitutionality of Section 48-508, Compiled Statutes of Nebraska for 1929, in so far as the same fixes or limits the fees or compensation of private employment agencies."

The court entered judgment on August 2, 1940, granting a peremptory writ of mandamus (R. 8).

A motion for rehearing (R. 22), after being entertained and considered, was overruled on October 8, 1940 (R. 22).

Mills Teachers Agency, Thomas Employment Service, Co-Operative Reference Company, Marti Reference Company, Watts Reference Company, Cornhusker Teachers Bureau, Grace Boomer, and Davis School Service filed a petition of intervention (R. 6) joining in the attack on the constitutionality of the price limiting provision of the law. All of said intervenors are joined as respondents herein.

B.

Reasons Relied on for Allowance of Writ.

The Nebraska Supreme Court granted the peremptory writ of mandamus solely because, in its opinion, the price limiting provision was in contravention of the due process clause of the Federal Constitution (R. 18-19). The Nebraska court held that the law when tested by the Nebraska Constitution (R. 11-12) was valid.

The Nebraska Court considered itself bound to follow *Ribnik* v. *McBride*, 277 U. S. 350, 48 S. Ct. 545. (Holding

a New Jersey statute, which gave the labor commissioner authority to fix fees of private employment agencies, unconstitutional on the ground that the business was not sufficiently affected with a public interest.) The petitioner endeavored to point out to the Supreme Court of Nebraska that the principles enunciated in that decision had been overruled by subsequent decisions of this Court. However, the Court in its opinion (R. 18) concluded:

> "In view of all argument, the pertinent legal conception is that the Supreme Court of the United States has not expressly overruled the case of Ribnik *v.* McBride, *supra*, and our research confirms this fact. • • • We conclude that we are bound by the decisions of the Supreme Court of the United States in its interpretation of the Federal Constitution."

The question presented is whether the State of Nebraska may, under the police power, establish a reasonable maximum rate of compensation chargeable by a private employment agency, or is the power to regulate by price control as distinguished from the power to regulate by other methods, *ipso facto* repugnant to the due process clause of the Federal Constitution.

The decision of the Supreme Court of Nebraska is not in accord with applicable decisions of this Court. It is in conflict with the doctrines and principles of this Court as announced in *Tagg Bros.* v. *United States*, 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703; *Townsend* v. *Yeomans*, 301 U. S. 441; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 825. This point is further developed on page 10 of the brief.

The construction and application of the Constitution of the United States and a prior decision of this Court (*Rib-*

nik v. *McBride*) are necessarily involved. The Supreme Court of Nebraska refused to be guided by the principles and doctrines which now govern the decision of this Court in cases involving the regulation of fees or the fixing of prices. A conflict between the *Ribnik* case and other applicable decisions of this Court exists and this Court alone can reconsider and reconcile the principles under which states are to be governed in the exercise of their police power, and the limitation placed upon said power by the Fourteenth Amendment.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court, directed to the Supreme Court of Nebraska, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 31021, State, *ex rel. The Western Reference & Bond Association, Inc., Relator*, v. *V. B. Kinney, Secretary of Labor of the State of Nebraska*, Respondent, and that the said decree of the Supreme Court of Nebraska holding Section 48-508 of the Compiled Statutes of Nebraska, 1929, (Laws of Nebraska, 1921, Chapter 189, pages 701, 704) repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, be reversed by this Honorable Court, and that your petitioner have such other and further relief as may be just and equitable.

WALTER R. JOHNSON,
Attorney General of Nebraska,
DON KELLEY,
Assistant Attorney General of Nebraska,
Counsel for Petitioner.

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No. 671

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Petitioner,

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STATE OF NEBRASKA, Ex Rel. WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; and DAVIS SCHOOL SERVICE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Nebraska was filed August 2, 1940. It appears on page 9 of the record and is reported in 138 Neb. 574, 293 N. W. 393. The opinion of the Court was written by Messmore, J. Justice Harvey

Johnsen filed a dissenting opinion which appears on page 19 of the record and is reported in 138 Neb. —, —, 293 N. W. 393, 399.

II.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Judicial Code, Section 237, as amended by the act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54; U. S. C. A., Title 28, Sec. 344 (b).

2. The original date of the judgment to be reviewed is August 2, 1940 (R. 8). Motion for rehearing was filed September 5, 1940, within the time provided by the rules of the Supreme Court of Nebraska (R. 22), and the motion for rehearing was overruled October 8, 1940 (R. 22).

3. This was an original action in mandamus instituted in the Supreme Court of Nebraska, the highest court of the State where judgment could be had, wherein it was alleged that Section 48-508, Compiled Statutes of Nebraska for 1929 (Laws of Nebraska, 1921, Chapter 189, pages 701, 704) was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 2-3). The Supreme Court held that it was repugnant to said Constitutional provision (R. 18-19).

4. Only one question is raised in this Court on the record. That question is whether the State of Nebraska may, under its police power, establish a reasonable maximum rate of compensation chargeable by a private employment agency, or is the power to regulate by price control, as distinguished from the power to regulate by other methods, *ipso facto* repugnant to the due process clause of the Constitution of the United States.

III.

Statement of the Case.

A sufficient statement of the case will be found in the accompanying petition (p. 2), so in the interest of brevity it will not be repeated here.

IV.

Specification of Errors.

1. The Supreme Court of Nebraska erred in finding and holding that the provisions of Section 48-508, Compiled Statutes of Nebraska, 1929 (heretofore set out verbatim on page 2 of the petition), limiting the fees of private employment agencies is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Nebraska erred in finding and holding that the principles of *Ribnik* v. *McBride*, 277 U. S. 350, 48 S. Ct. 545, were applicable and binding upon it in view of the principles which now govern the action of this Court.

V.

ARGUMENT.

Summary of Argument.

Point A. The decision of the Supreme Court of Nebraska is contrary to and in conflict with current decisions of this Court relative to price regulation as a constitutional exercise of the State's police power.

Point B. The statute in question is not repugnant to the due process clause of the Fourteenth Amendment when tested in the light of recent decisions of this Court.

Point A. Conflict With Current Decisions.

The Nebraska Supreme Court held the following statutory provision invalid:

> "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all the moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer."

The foregoing statute had been attacked on the ground that it violated Article I, Section 3, of the Constitution of the State of Nebraska, which reads:

> "No person shall be deprived of life, liberty or property, without due process of law."

The State court held that the foregoing statute was valid when tested by the Nebraska 'due process' provision.

However, the State court sustained the challenge to the validity of the statute based upon its repugnancy to the 'due process' clause of the Fourteenth Amendment to the Federal Constitution, relying upon and following the decision of this Court in *Ribnik* v. *McBride*, 277 U. S. 350.

The petitioner believes that this Court has departed from the "public interest" doctrine of the *Ribnik* case. The theory or principle of the *Ribnik* case can be developed briefly by a few short quotations from the opinion. They are:

> "Has the business in question been devoted to the public use and an interest in effect granted to the public in that use? Or, in other words, is the business

one 'affected with a public interest,' within the meaning of that phrase as heretofore defined by this Court?" (277 U. S. 350, 355.)

"Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, Tyson & Bro.-United Theater Ticket Offices *v.* Banton, supra, pp. 431, 437, the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place." (277 U. S. 350, 357.)

"And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices." (277 U. S. 350, 358.)

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided." (277 U. S. 350, 358.)

Briefly, the effect of the foregoing declarations is that only businesses which are greatly affected by a public interest may be regulated to the extent of "price fixing", and that, even though certain evils exist in businesses subject to regulation generally, they cannot be regulated to the extent of fixing the prices they may charge for their services or goods.

A few references to subsequent decisions of this Court will demonstrate that the principles of the *Ribnik* decision cannot be reconciled with the current attitude of this Court toward the matter of legislative price fixing.

Bearing in mind that the Court in the *Ribnik* opinion recognized that the private employment agency business was sufficiently affected with a public interest to permit of regulation, let us now consider the more recent decision of *Nebbia* v. *New York*, 291 U. S. 502 (1934). From the language of Justice Roberts' opinion we take the following (p. 531):

> "But if, as must be conceded, the industry is [2] subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago."

And subsequently, on p. 536, the opinion said:

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of the courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. * * * The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control

[2] "Relator concedes that a private employment agency is subject to regulation by the state * * *." From the majority opinion, State v. Kinney, 138 Neb. 574, 293 N. W. 393, 394.

for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

The definition of "due process" can be more briefly stated by quoting from the opinion of this Court in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391. Chief Justice Hughes, speaking for the Court, said:

"Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

Perhaps it would be well to mention that there was no attack by Relator below challenging the reasonableness of of the law is to prevent overreaching by the employment the statute in question. This was pointed out in the majority opinion (293 N. W. 393, 397) in this language:

> "(In the instant case there is no contention on the part of the relator that that part of section 48-508, Comp. St. 1929, here objected to, is arbitrary or discriminatory.)"

Justice Johnsen concluded his dissenting opinion:

> "The reasonableness of the charge fixed by the legislature in the statute is not raised in this proceeding and so is not involved."

Your petitioner believes that these decisions also support the principles of the *Nebbia* and *West Coast Hotel Company* cases and conflict with the principle of *Ribnik* v. *McBride:*

Tagg Bros. v. *United States,* 280 U. S. 421;
O'Gorman & Young v. *Hartford Fire Ins. Co.,* 282 U. S. 251;
Townsend v. *Yeomans,* 301 U. S. 441;
State Highway Dept. v. *Barnwell Bros.,* 303 U. S. 177;
The Sunshine Anthracite Coal Co. v. *Adkins,* 310 U. S. 381.

Point B. Statute Valid under Recent Decisions.

> "Regulation which is reasonable in relation to its subject and is adopted in the interest of the community *is due process* within the meaning of the provisions of the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without due process of law." (Italics ours.)

The Nebraska statute is valid when tested by the foregoing formula from the *West Coast Hotel Company* case,

supra. The subject of the regulation is the fees charged by private employment agencies for their services in procuring jobs for those seeking them. The obvious purpose of the law is to prevent over-reaching by the employment agency. The only effective way to prevent such an evil is by limiting the amount an agency may exact from the applicant. If, as it is conceded, regulation is permissible, it surely is reasonable to regulate by that method which will accomplish the legislative purpose.

The petitioner does not deem it essential to elaborate on this point, particularly when the only challenge concerns the right or power of the State to regulate fees of a private employment agency, and does not attack the law because it is discriminatory, arbitrary, unreasonable or that it fails to accomplish the legislative aim.

Point B is not of prime importance in this lawsuit. The only important question is whether the principles of *Ribnik* v. *McBride* are going to prevail and leave the private employment agency business in one category and place all other businesses in another category to be governed by the principles of the *Nebbia* case.

Conclusion.

Your petitioner respectfully submits that the final termination by this Court of the questions of law involved in this case is of great importance to the States because of the present increased opportunities for overreaching by agencies. This is due to the stimulation to business, which is returning many to the payrolls. The legislatures of the States should be placed in a position where they can deal with the problem without the restrictions of *Ribnik* v. *McBride.* The question is of more than local interest to Nebraska. The error which the Supreme Court of Nebraska felt that it was compelled to make should be rectified. An opportunity is here offered to this Court to expressly over-

rule *Ribnik* v. *McBride*, thereby eliminating the confusion resulting from it.

The prayer of the petition should, therefore, be granted.

Respectfully submitted,

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